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Supreme Court of the United States.

No. 115. OCTOBER TERM, 1906.

ARTHUR E. APPLEYARD, APPELLANT,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES.

BRIEF FOR THE APPELLEE—THE COMMONWEALTH OF MASSACHUSETTS.

Supreme Court of the United States.

No. 115. October Term, 1906.

ARTHUR E. APPLEYARD, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, APPELLEE.

Statement of the Case.

This case arises upon a demand by the Executive of the State of New York upon the Executive of the Commonwealth of Massachusetts for the surrender of Arthur E. Appleyard, the appellant, an alleged fugitive from justice, charged with the commission of acts which are alleged to constitute a crime within the jurisdiction of the State of New York. An indictment against the appellant was found by the grand jury of the county of Erie in the State of New York, setting forth that, on the eighteenth day of May, 1904, the appellant obtained from The German Bank of Buffalo, through one Emory, its president, who was fully authorized thereto by the by-laws of the bank, the sum of $49,250, giving in return for such loan his note, dated May 14, 1904, for $50,000, together with seventy bonds of the Ohio Union Traction Company as collateral, representing to the said Emory that such corporation owned and controlled certain other railroad corporations organized under the laws of the State of Ohio, and that the bonds of the Ohio Union Traction Company were each worth $750, and were full security for the payment of the note above referred to. It is further alleged

in the indictment that The German Bank, and Richard Emory, its president, believing the false pretences and representations made by Arthur E. Appleyard, and being deceived thereby, were induced, by reason of such false pretences and representations, to deliver, and did deliver, to the said Appleyard $49,250 in money of the property of The German Bank, and that Appleyard feloniously received and obtained that amount with the intent feloniously to deprive and defraud the said The German Bank of its property, and of the use and benefit thereof, and to appropriate such property to his own use; and that the said Appleyard did then and there feloniously appropriate to his own use said $49,250 of the property, moneys, valuable things, goods and chattels, personal property and effects of the said The German Bank, said body corporate, with intent to feloniously deprive and divert the said The German Bank of its property and of the use and benefit thereof. A second count in the indictment charges Appleyard with feloniously stealing, taking and carrying away $49,250 in money, of a kind, number and denomination unknown to the grand jury, contrary to the form of the statute in such case made and provided, and against the peace of the people of the State of New York and their dignity (Record, p. 27).

Upon request of counsel for the alleged fugitive, and by direction of His Excellency the Governor of the Commonwealth of Massachusetts, full hearing was had before the Attorney-General upon certain questions of law and fact, and certain evidence in the form of affidavits was presented tending to show, first, that the alleged fugitive was not within the State of New York upon the date of the offense set forth in the indictment accompanying the requisition of the Executive of the State of New York; second, that no crime had been committed within the jurisdiction of the State of New York; and third, that the alleged fugitive left the State of New York before he was aware that he had committed or could be charged with any offence against the laws of that State.

Upon report of the Attorney-General (Record, p. 5), as required under the provisions of the Revised Laws of Massachusetts, chapter 217, section 12, advising the Governor that there appeared to be no reason why the demand of the Executive of the State of New York should not be honored, His Excellency the Governor, acting in accordance with such advice, issued a warrant of extradition directed to Frederick A. Rhoades, a duly appointed officer of the Massa-

chusetts District Police (Record, p. 2). Upon the service of such warrant, the appellant applied for a writ of *habeas corpus* in the Supreme Judicial Court for the Commonwealth of Massachusetts, and upon hearing before a single justice of that court, offered to introduce the same evidence which had been previously presented to the Attorney General, for substantially the same purposes. The court, however, refused to receive the evidence, and remanded the prisoner to the custody of the officer duly appointed to receive him.

On April 18, 1905, the appellant applied to the Circuit Court of the United States for a writ of *habeas corpus* (Record, p. 1). To this writ Frederick A. Rhoades, district police officer of Massachusetts, respondent, made a return, which was filed on April 22, 1905, substantially setting forth the facts already stated, and justifying, upon the ground that the petitioner was lawfully in his custody by virtue of the warrant issued by the Governor of the Commonwealth of Massachusetts.

Upon the same date the case was heard upon the return on the writ of *habeas corpus* and the petitioner's offer of proof and requests for rulings and findings. The offer of proof (Record, p. 36) made by the appellant was as follows: —

1. Offers to introduce the testimony of Appleyard, Jenks, Sage, Van Vorst, Reed, Locke, McCormick, Sweet, Carter, Kingsbury, Twitty, Walker and Mrs. Appleyard, constituting all the evidence submitted by the petitioner to His Excellency the Governor, for the purpose of showing that the warrant for extradition ought not to have issued, and that Mr. Appleyard is not a fugitive from justice within the meaning of section 2, Article 4 of the Constitution of the United States, and of section 5278 of the Revised Statutes of the United States.

2. Offers to introduce the testimony of Mr. Appleyard and Mr. Jenks regarding what the defendant claims to have been the actual transaction connected with the obtaining of $50,000 from The German Bank of Buffalo, on which the indictment in New York was based, for the purpose of showing —

(*a*) That what was done did not constitute a crime under the laws of the State of New York.

(*b*) That no crime was committed in the State of New York.

(*c*) That Mr. Appleyard had no knowledge of having done anything which was a crime under the laws of the State of New York.

(*d*) That under all the circumstances there was no conscious fleeing from justice on his part.

3. Offers to introduce the testimony of Appleyard, Jenks, Sage, Van Vorst, Reed, Locke and Mrs. Appleyard regarding the presence of Mr. Appleyard in the State of New York between May 18, 1904, and December 5, 1904, his manner of travelling about, registering at hotels, general conduct, etc., for the purpose of showing that he was not a fugitive from justice, and that there was no conscious flight from justice by him.

4. Offers to introduce the testimony of Appleyard, Jenks, Kingsbury, Twitty and Walker, for the purpose —

(*a*) Of contradicting the testimony of Emory, Coaney and Twitty, presented in connection with the application for the warrant for extradition.

(*b*) Of showing that Mr. Appleyard was not in the State of New York on May 18, 1904.

(*c*) Of showing that he left New York with the consent of the person alleged to have been defrauded.

These affidavits were in brief as follows: the affidavit of Appleyard set forth his occupation and business, which is that of a broker with an office in the city of Boston and other offices in Philadelphia and Cincinnati; that he had been engaged in the construction of gas and electric plants and street railways in which he was a controlling owner, and a detailed account of the transactions which are alleged in the indictment before quoted to constitute the crime with which Appleyard is charged in the State of New York, tending to show that such transactions were actually entered upon on May 14, 1904, Appleyard then being in his office at Boston, and were completed on May 17, 1904, and that during the course of such transactions Appleyard was not within the State of New York. Certain specific dates are alleged subsequent to May 18, 1904, up to and including December 5 of the same year upon which he visited the State of New York in connection with his business, and it is alleged that the visits so made were made openly and without attempt at concealment (Record, p. 37).

The affidavit of Herbert M. Jenks states that he was the representative of Appleyard in Buffalo in the matter of the purchase of The German Bank and in his personal business, and that in connection with the latter he delivered the collateral before referred to to The German Bank, such delivery being on May 17, 1904. Annexed to this affidavit are certain records of the Ohio Union Traction Company, tending to show that Emory, president of The German

Bank, was familiar with the status and property of that corporation until a date later than that upon which it is charged the alleged misrepresentations regarding such corporation were made to him (Record, p. 46).

The affidavits of Sage, Van Vorst, Reed, Locke, McCormick, Sweet, Carter and Mrs. Appleyard, referred to in the offer of proof, all tended to show that on certain specific dates subsequent to the eighteenth day of May, and prior to the sixth day of December, 1904, the appellant was openly present within the jurisdiction of the State of New York (Record, pp. 57–61, inclusive, 63, 64, 65).

The testimony of Twitty was in the form of an affidavit tending to contradict or explain an affidavit made by the same person and annexed to the demand of the Executive of the State of New York for the extradition of the appellant (Record, p. 25), and sets forth that Appleyard, Emory and one Coaney were in the habit of hiring horses of the defendant for riding; that, in so ordering, they were accustomed to use each other's names, and that this might have been the case upon the date referred to in the former affidavit by deponent; and that deponent has no personal knowledge whether or not Appleyard was present upon that particular occasion (Record, p. 61).

The testimony of Joseph A. Kingsbury, a director of the Camden National Bank at Camden, New Jersey, was in the form of an affidavit stating that Charles F. Coaney, whose affidavit was annexed to the demand of the Executive of the State of New York (Record, p. 21), and tended to show that the person demanded was in fact a fugitive from justice, was also a director in the same bank, and on May 18, 1904, between the hours of 11 and 12 o'clock, was present with the said Coaney at a meeting of the board of directors of such bank.

The affidavit of Guy M. Walker (Record, p. 67), referred to in the offer of proof, tended to throw doubt upon the good faith of the affidavit of Emory, annexed to the demand of the Executive of the State of New York (Record, p. 18), by setting forth a statement made by Emory to the deponent to the effect that he had been promised immunity from prosecution in connection with the failure of The German Bank if he would make a full and detailed disclosure of the facts in connection therewith, and further stating that such disclosure was unsatisfactory to the prosecuting authorities for the reason that it failed to incriminate anybody.

The appellant also made the following requests for rulings of law and findings of fact: —

Requests for Rulings.

1. On all the evidence it does not appear that Mr. Appleyard is a fugitive from justice within the meaning of section 2, Article 4 of the Constitution of the United States, and of section 5278 of the Revised Statutes of the United States, and he should therefore be discharged from custody.

2. Unless it appears positively by a preponderance of the evidence that Mr. Appleyard consciously fled from justice when he left the State of New York, he should be discharged from custody.

3. In this proceeding the finding by the Governor as a fact that Mr. Appleyard is a fugitive from justice is not conclusve.

Requests for Findings of Fact.

1. That the acts of Mr. Appleyard in connection with obtaining $50,000 from The German Bank of Buffalo, on which the indictment was based, do not constitute a crime under the laws of the State of New York.

2. That no crime was committed by Mr. Appleyard in the State of New York.

3. That Mr. Appleyard was not in the State of New York on May 18, 1904, the date of the alleged crime.

The court, by a decree dated April 22, 1905, refused the appellant's first and second requests for rulings of law and all the appellant's requests for findings of fact, and granted the third request for a ruling of law (Record, p. 68).

The petitioner then appealed from the decision rendered to this court, and filed the following assignment of errors: —

First. — The court erred in refusing to rule that upon all the evidence the petitioner was not a fugitive from justice within the meaning of section 2 of Article 4 of the Constitution of the United States, and of section 5278 of the Revised Statutes of the United States, and should therefore be discharged from custody.

Second. — The court erred in refusing to rule that unless it appeared positively, by a preponderance of the evidence, that the petitioner consciously fled from justice when he left the State of New York, he should be discharged from custody (Record, p. 69).

The assignment of errors contains no reference to the appellant's offer of proof, and it does not appear, either from the decree of the court or from the record generally, what disposition was made of it; it appears inferentially from the decree, however, that the evidence which was the subject of the offer, so far as it was material to the question at issue, was admitted and was considered by the court.

There are, therefore, two questions for the consideration of this court: first, whether or not upon all the evidence as above set forth the court erred in refusing to rule as matter of law that the petitioner was not a fugitive from justice; and second, whether or not the court erred in refusing to rule that it was material and necessary to show by preponderance of evidence that the petitioner consciously fled from the justice of the State of New York.

Statutes.

Constitution of the United States, Article 4, section 2: —

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Revised Statutes of the United States, section 5278: —

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such

authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory.

Argument.

Assignment of Errors.

The legal sufficiency of the papers accompanying the demand of the Executive of the State of New York, and the regularity of the proceedings before the Executive of the Commonwealth of Massachusetts, are not questioned, and there is no dispute with respect to the identity of the person sought to be extradited. The sole question raised by the appellant's first assignment of error is, therefore, whether or not the court below was required as matter of law to find upon all the evidence before it that the appellant was not a fugitive from justice within the meaning of section 2 of Article 4 of the Constitution of the United States and of section 5278 of the Revised Statutes of the United States.

Whether or not Appleyard was a fugitive from justice within the meaning of the statute above cited and of the Constitution of the United States is a pure question of fact. In the leading case of Roberts *v.* Reilly, 116 U. S. 80, the court, through Mr. Justice Matthews, says, at p. 95: —

> The act of Congress, Revised Statutes, section 5278, makes it the duty of the executive authority of the State to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found, or affidavit made, before a magistrate of any State, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the State from whence the person so charged has fled.
>
> It must appear, therefore, to the governor of the State to whom such a demand is presented, before he can lawfully comply with it, first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the

State making the demand; and second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand.

The first of these prerequisites is a question of law, and is always oper upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. *Ex parte* Reggel, 114 U. S. 642.

In *Ex parte* Reggel, 114 U. S. 642, 651, the court uses the following language: —

The only question remaining to be considered relates to the alleged want of competent evidence before the Governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the Governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the Executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the Executive of

the State or Territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had, in fact, never been in the demanding State, and, therefore, could not be said to have fled from its justice. Upon the Executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."

See also Hyatt *v.* Corkran, 188 U. S. 691, 709.

Since this assignment of error raises only an issue of fact, this court will not revise the findings of fact of the trial court, if there is evidence adequate to justify them.

Zeckendorf *v.* Johnson, 123 U. S. 617.
Hewitt *v.* Campbell, 109 U. S. 103.
Jeffreys *v.* Mutual Life Insurance Co., 110 U. S. 305.
Central Pacific Railroad Co. *v.* California, 162 U. S. 91.

That there was evidence to justify the court in refusing to find that Appleyard was not a fugitive from justice, as requested by appellant, clearly appears from a consideration of the testimony in the form of affidavits accompanying the demand of the Executive of the State of New York and submitted to the Executive of the Commonwealth of Massachusetts, which, together with the demand itself, were before the United States Circuit Court.

A "fugitive from justice" has been defined as being one who, "having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, . . . has left its jurisdiction and is found within the territory of another" (Roberts *v.* Reilly, *supra;* Kingsbury's Case, 106 Mass. 223); and the evidence to justify the finding either of the Executive of the Commonwealth of Massachusetts or of the Circuit Court of the United States must, therefore, establish, first, that the person charged was within the State whose executive makes demand for extradition when the crime was committed; and second, that since the commission of the crime he has left the jurisdiction of that State and is found within the State upon which the demand is made.

It appears from the affidavit of Richard Emory (Record, p. 18) that on the eighteenth day of May, the date of the alleged offense against the laws of the State of New York, as set forth in the indictment accompanying the demand of the Executive of the State of New York, Appleyard presented to the deponent a note dated May 14, 1904, for the sum of $50,000, and tendered certain bonds as collateral security, at the same time making the alleged false and fraudulent representations, which, together with the acts set forth, constituted the offense alleged in the indictment. The affidavit further states that "deponent knows of his own knowledge, by reason of the premises aforesaid, that the defendant, Arthur E. Appleyard, was in the city of Buffalo on the eighteenth day of May, 1904, and that he has since departed therefrom, and deponent is informed and verily believes that said defendant is now in the State of Massachusetts, and he knows that his residence and business address is No. 50 State Street, Boston, Massachusetts, and his home address, 1674 Beacon Street, Brookline, Massachusetts; and that deponent believes the said defendant, Arthur E. Appleyard, departed from this State on or about the fifth day of December, 1904."

A second affidavit, by one Charles F. Coaney (Record, p. 21), after alleging that the deponent had served as secretary to Appleyard and also as secretary of the several railroad corporations, the franchises of which were alleged to have been transferred to the Ohio Union Traction Company, and that on the eighteenth day of May, 1904, none of such corporations were controlled by the Ohio Union Traction Company, or have ever been transferred to said company, proceeds as follows: "That he knows of his own knowledge that the said defendant, Arthur E. Appleyard, was in the city of Buffalo and State of New York on the eighteenth day of May, 1904, and has since departed therefrom."

James Holmes, a detective sergeant of the city of Buffalo, made affidavit (Record, p. 22) on information and belief "that the defendant was in the city of Buffalo about the time the crime is alleged to have been committed, . . . and that the defendant is now in the city of Boston, State of Massachusetts."

One James T. Twitty makes affidavit (Record, p. 25) that he is a resident of Buffalo and conducts a riding academy in that city, and has been so engaged for a period of five years; that he is personally acquainted with Appleyard, who upon several occasions hired and

rented of him saddle horses; and that from his books and records it appears that Appleyard, on May 18, 1904, rented from him a saddle horse, which was used for about an hour and duly paid for.

All of these affidavits accompany the demand of the Executive of the State of New York, and were properly before the court.

The evidence of the presence of Appleyard in the city of Buffalo and State of New York on the date alleged in the indictment is uncontradicted. The appellant himself (Record, p. 37) submitted a lengthy affidavit describing the nature of the acts done by him which are alleged to constitute a crime, but nowhere does he deny that he was in the city of Buffalo at the time of the offense charged in the indictment; nor, with the exception of a second affidavit by Twitty (Record, p. 61), tending to discredit the statements previously made by him under oath and annexed to the demand of the Executive of the State of New York, is there any evidence, either direct or inferential, to contradict the positive testimony of Emory and Coaney that on the eighteenth day of May, 1904, Appleyard was within the State of New York.

Upon this uncontroverted evidence the court below was not only justified but required to refuse to grant the ruling of law requested by the appellant, that Appleyard was not a fugitive from justice.

Appleyard's second assignment of error is based upon failure of the trial court to rule that "unless it appears positively by a preponderance of the evidence that the petitioner consciously fled from justice when he left the State of New York, he should be discharged from custody." In other words, the appellant contends that conscious guilt, or at least an intent to avoid the consequences of a known crime or a certain prosecution, is an element which is essential to constitute a flight from justice within the meaning of the Constitution and statutes of the United States.

The doctrine so contended for has never received the sanction of this court. Indeed, in Roberts *v.* Reilly (116 U. S. 80, 97) it is expressly negatived by the language of Mr. Justice Matthews, who delivered the opinion of the court: —

> To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have

been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another.

So in the case of one White, reported in 55 Fed. Rep. 54, the court, at p. 57, say: —

The appellant contends that the affidavits produced are insufficient; that he was not a fugitive from justice, within the meaning of the section; and that the court below erred in refusing to receive the evidence offered by him to overcome the presumption that he was such fugitive, arising from the issuing of the warrant of removal by the Executive of the State to whom the demand was presented. The criminal complaint sworn to by Walter R. Stoll is in all essentials an affidavit, and charges the petitioner with stealing shares of stock and corporation bonds of sufficient value to constitute the offense of grand larceny, which offense the affidavit of Breckons shows to be a crime under the laws of Wyoming. The affidavit of Breckons also shows that White left Wyoming five days after the day on which the offense is alleged in Stoll's affidavit to have been committed, and came to New York. Such a showing is quite sufficient to warrant the conclusion that petitioner was a fugitive from justice from the State of Wyoming. The evidence as to the circumstances of his departure from Wyoming, offered by his counsel, was irrelevant and immaterial. The offer was to prove that White came from Wyoming to New York on legitimate business at the suggestion of his wife, from whom it is alleged he stole the stocks and bonds, and of Stoll, who swore to the complaint; that he came to put his son at school in Poughkeepsie, and to organize a coal company as agent for his wife. Proof of these facts, however, would in no respect alter the situation. A person is a fugitive from justice when, having committed a crime within a State, he withdraws himself from the jurisdiction of its courts without waiting to abide the consequences of such act, and it matters not that some other cause than a desire "to flee" induced such withdrawal. As stated by the Supreme Court (Roberts *v.* Reilly, 116 U. S. 80, 6 Sup. Ct. Rep. 291), it is not necessary that the party charged should have left the State "for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constituted a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

In re Bloch, 87 Fed. Rep. 981, contains an equally explicit statement of the law upon this point, together with an interesting and exhaustive collection of both Federal and State authorities.

The case of Streep *v.* United States, 160 U. S. 128, 133, is not in conflict with the decisions already cited, for while that case holds that under section 1045 of the Revised Statutes of the United States, providing that "nothing in the two preceding sections" (which established certain limitations of time for the presentation of charges of certain criminal offenses) "shall extend to any person fleeing from justice," it is sufficient if there be "a flight with the intention of avoiding being prosecuted," it is to be observed that the court was not there required to pass upon the precise point now under consideration, and that in the course of the opinion it is declared by Mr. Justice Gray that section 1045 must receive the same construction as that given by the decision in Roberts *v.* Reilly, *supra*, to section 5278, which is thus expressly affirmed. Moreover, it would seem that the requirements of section 1045 would be fully satisfied by a "flight or *voluntary withdrawal*" from the jurisdiction.

United States *v.* Hewicker, 79 Fed. Rep. 59.

For the Appellee, the Commonwealth of Massachusetts,

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